



THE COURT *Legacy*

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Henry Billings Brown

By Edward M. Wise

Henry Billings Brown was the third district judge for the Eastern District of Michigan, preceded only by Ross Wilkins (1837-1870) and John W. Longyear (1870-1875). He was district judge for 15 1/2 years (1876-1890), and a justice of the U.S. Supreme Court for another 15 1/2 years (1891-1906). He is usually remembered, if at all, for his opinion in *Plessy v. Ferguson* (1896), upholding "separate but equal" racial segregation in public transportation.

Brown was born on March 2, 1836, at South Lee, in western Massachusetts. His father, a well-to-do mill-owner and merchant, moved to Stockbridge in 1845, then to Ellington, Connecticut, in 1848. He sent Brown to good prep schools, to Yale College at the early age of 16 and, after graduation in 1856, to Europe for a year's grand tour. Late in 1857, Brown started reading law at an office in Ellington. For two terms in 1858-59, he took courses at the Yale Law School, then for six months in 1859 at the Harvard Law School. In the fall of 1859, he migrated to Michigan, to make his own future in the west. He completed his legal apprenticeship with the firm of Walker & Russell in Detroit, and was admitted to the Wayne County bar on July 20, 1860.

Through family connections, he was appointed in April 1861 as a deputy U.S. Marshal under the new Lincoln administration; the same month he also was appointed as a part-time assistant U.S. Attorney, a post he held until 1868, trying cases for the government and simultaneously developing a private practice, largely in admiralty law. Detroit at the time was a busy Great Lakes port, and most federal litigation involved commercial and maritime cases.

Brown had unfocused political ambitions; the diary he kept during these years is filled with expressions of disappointment with his own performance as both a lawyer and public speaker.

In 1864, he married Caroline Pitts, the daughter of a Detroit lumber baron. Her father died in 1868, and her inheritance largely relieved Brown of the financial anxieties he felt during his first years at the bar. In July 1868, he accepted interim appointment as Wayne County Circuit Judge, but was defeated by his Democratic opponent in the November election. He returned to practice as a partner with John S. Newberry and Ashley Pond in the city's leading admiralty firm. He was regularly called on to lecture before civic groups and at the University of Michigan



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law school. But his bad luck in electoral politics persisted: in 1872, he unsuccessfully sought the Republican nomination for Congress.

In 1875, President Grant appointed him as district judge for the Eastern District of Michigan. His court was the busiest admiralty court in the country outside New York, and Brown came to be regarded as an authority on the subject. In 1876, he published a collection of admiralty decisions. He must have been working on it while in practice: it continued a volume compiled by John Newberry in 1867, and reported the most important admiralty cases arising in Michigan and northern Ohio during the past 18 years. One opinion in the book was by Brown himself. More than half were by Judge Longyear during his five years on bench; in most of them, Brown had appeared as counsel.

Brown was said to be a good trial judge, a patient listener, a careful student of the authorities, judicious in temperament, and reserved and formal in manner -- "dignified almost to austerity." He later recalled that "when I was a District Judge, nothing pleased me better than to leave the Bench, take a seat at the Clerk's desk, with the sailors about me in an admiralty case, and examine them as if I were the captain of a ship; and then to ask a couple of sea-masters to sit with me on the Bench and listen to the arguments."

In 1890, President Harrison appointed him to the U.S. Supreme Court; he took his seat on January 5, 1891. His appointment had been promoted by Howell E. Jackson of Tennessee, then Circuit Judge for the Sixth Circuit, a close friend of Harrison's when both served in the Senate. (Jackson later served on the Supreme Court himself -- briefly -- from 1893 to 1895.)

Brown sat on the Court during the chief justiceship of Melville Fuller (1888-1910). In modern times, the Fuller Court has been ranked among the worst in the history of the Supreme Court. Its decisions are replete with exaggerated insistence on the sanctity of private property, paranoid hostility to government regulation, xenophobic disdain for immigrants, and utter indifference to racial injustice. Brown generally fell in with the group led by Justices David Brewer (a Yale classmate of Brown's) and Rufus Peckham that dominated the Court. He was, for instance, a member of the majority in *Lochner v. New York* (1905), the classic statement of the doctrine of "liberty of contract."

Sometimes, however, Brown broke with his more extreme colleagues. He wrote, for instance, the opinion in *Holden v. Hardy* (1898), upholding a Utah protectionist labor law restricting male miners to an eight-hour day; and he dissented in *Pollock v. Farmers' Loan* (1895), the case which struck down the federal income tax. His dissent in *Pollock*, coming from a usually reliable conservative, contained unexpected flashes of fire; the Court's decision, said Brown, deprived Congress of a power which existed in "nearly every civilized state," and represented "a surrender of the taxing power to the monied class," a "first step toward the submergence of the liberties of the people in a sordid despotism of wealth."

In extra-judicial utterances as well, Brown sometimes had a good word for government intervention, if pursued in moderation. He spoke of law as a progressive science. A Taft supporter in 1912, he nonetheless had "no fear for the safety of the country" even with Theodore Roosevelt or Woodrow Wilson. He seems to have been incapable of excessive partisanship, regarding it as a virtue in his New England ancestors that, although Puritans, they "were neither bigoted nor intolerant -- upon the contrary, some were unusually liberal." Justice Day remembered him as "one of the most agreeable of colleagues, and absolutely free from all jealousy and bitterness."

Brown was not a major figure on the Court: "in no instance," says Owen Fiss, "was he the architect of any especially noteworthy doctrine or judicial opinion." He was a capable and solid, if unimaginative, legal technician, respected for his knowledge of federal specialties such as patent and admiralty law (where his decisions tended to expand jurisdiction and restrict recovery); the other justices usually followed his lead in these matters. Even his official biographer, Charles Kent, concluded that Brown's life showed how a man "without perhaps extraordinary abilities" might "attain and honor the highest judicial position by industry, by good character, pleasant manners and some aid from fortune."

The great adversity in his life was the threat of blindness. He had weak sight from childhood, suffered from severe chronic headaches and neuritis, lost the use of an eye in 1890 just before joining the Supreme Court, and was faced for a time with the loss of the other. His angular shaky handwriting shows it.

Brown voluntarily retired from the Court at age 70. As an ex-justice, he delivered some quirky lectures, on "The Status of the Automobile" (which he hoped would not supplant in men's affections "the noblest of all domestic animals -- the horse") and on "Woman Suffrage" (which he opposed on the ground that it would "brush away that bloom of delicacy and refinement which from time immemorial has won the admiration and evoked the chivalry of the stronger sex").

His wife Caroline died in 1901 during a summer tour in Italy. Three years later, at age 68, he married Josephine Tyler, the widow of a cousin. After his retirement, they continued to live in Washington until 1912, then in Bronxville, New York. Brown died of a heart attack in New York City on September 4, 1913. Although he did not often come back to Michigan during his lifetime -- and apparently regarded Detroit with some condescension -- he was buried by the side of his first wife in Elmwood Cemetery.

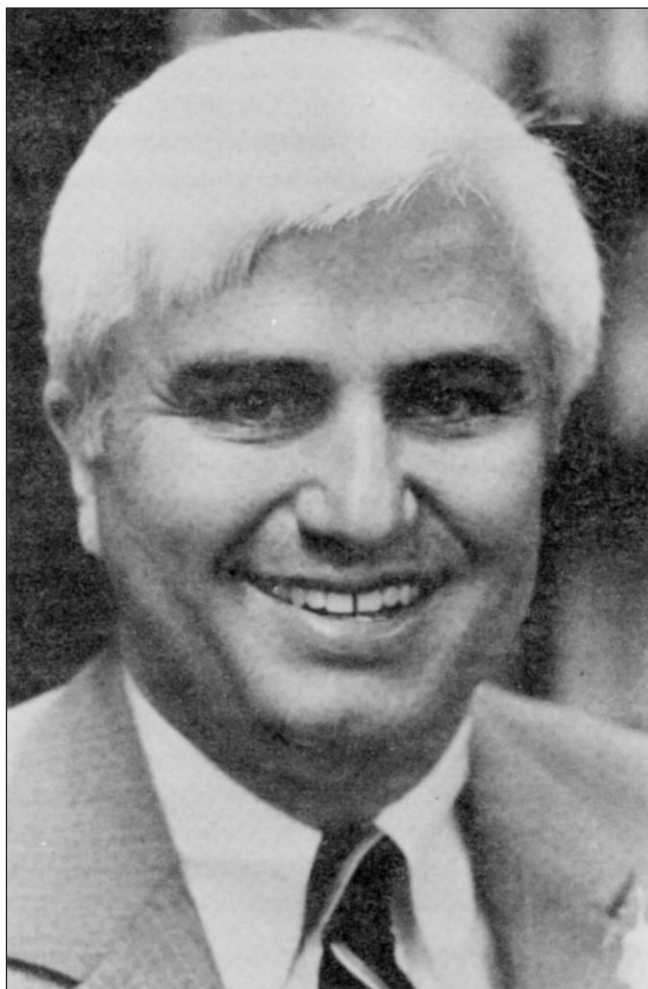
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Editor's Note: Edward M. Wise is a professor of law at Wayne State University Law School where he teaches legal history, comparative law, criminal law, and international criminal law. Among other works, he has published The History of the Michigan Supreme Court in the Nineteenth Century.

LINCOLN HISTORIAN ADDRESSES SOCIETY'S ANNUAL MEETING

Lincoln scholar Cullom Davis was the guest speaker at the U.S. District Court Historical Society's fourth Annual Meeting on October 30, 1996 at the Theodore Levin United States Courthouse. Trustee and Senior Judge John Feikens introduced Sagamon University history professor emeritus Davis who spoke eloquently on *Abraham Lincoln's Federal Practice*. Since 1988 Davis has been director and senior editor of **The Lincoln Legal Papers**, a documentary history of the law practice of Abraham Lincoln, 1836-1861. His awards include the Lincoln Diploma of Honor from the Lincoln Memorial University, and most recently he served as president of the Abraham Lincoln Association.



Guest Speaker Cullom Davis

President Sharon M. Woods reported on the activities of the Society over the past year noting that the Five-Year Plan as proposed by the Society in 1992 is beginning its fifth year with an admirable record of achievement. Woods noted that although the past year has seen challenges and limited growth, the Society can point with pride to its progress in reaching its goals, including ten oral histories which have been completed by Professor Philip P. Mason with members of the court. A presentation of his published oral history was made to Judge Horace W. Gilmore at the Annual Meeting by Trustee Harold Norris.

President Woods reflected on the death of Trustee Bradley M. Thompson in April of this year. Bradley, who had carried on a family tradition as the president of the Detroit Legal News from 1965 until his retirement last fall, made meaningful contributions to the Society. His presence will be missed.

President Woods concluded her remarks by expressing gratitude to executive director Peggy Brann for her dedication and perseverance in helping to guide the goals of the Society.

William Winsten, Secretary-Treasurer, then gave the treasurer's report for the period ending October 30, 1996. The Society had a balance of \$77,391.70. Receipts were \$106,764.32; disbursements \$29,372.62.

Upon recommendation by the nominating committee, the following officers were re-elected to one-year terms: Sharon M. Woods, President; John H. Dise, Jr., Vice President; and I. W. Winsten, Secretary-Treasurer. Newly elected Trustee is Michael Leibson of the U.S. Attorney's Office.

Although a winning manuscript was not selected for the *Otis M. Smith Award*, submissions for the 1997 competition on any aspect of the history of the U.S. District Court for the Eastern District of Michigan, its judges or its decisions and their impact on the State of Michigan, are being accepted. The *Otis M. Smith Award* carries a cash award of \$1,000.